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In the Supreme Court of the United States

OCTOBER TERM, 1989

ACHILLES CONSTRUCTION COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in fashioning a particular backpay and make-whole remedy for strikers unlawfully denied reinstatement.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-4a) is unreported. The supplemental decision and order of the National Labor Relations Board (Pet. App. 5a-11a), including the supplemental decision of the administrative law judge (Pet. App. 12a-23a), is reported at 290 N.L.R.B. No. 34. The decisions of the Board and the court of appeals in the underlying unfair labor practice proceeding are reported at 252 N.L.R.B. 904 and 681 F.2d 130, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1989. The petition for a writ of certiorari was

filed on June 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1975, petitioner's seven employees went on strike. In August 1978, the employees, through their union, unconditionally offered to return to work. Petitioner refused to reinstate the striking employees. Pet. App. 6a. In 1980, the Board found that petitioner's refusal to grant reinstatement violated Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(3) and (1)). Consequently, the Board directed petitioner to offer reinstatement to the employees and to pay them backpay. The backpay was to be in an amount sufficient to make the employees whole for any lost earnings flowing from the discriminatory denial of reinstatement. Pet. App. 2a, 6a, 12a-13a, 21a; see *Kuno Steel Products Corp.*, 252 N.L.R.B. 904 (1980), enforced *sub nom. NLRB* v. *Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).[1]

2. Thereafter, the parties were unable to agree on the amount of backpay owed the discriminatees. Accordingly, a backpay proceeding was instituted to determine the backpay due. See 29 C.F.R. 102.52 *et seq.* In 1987, after a hearing, the administrative law judge (ALJ) filed a recommended backpay order. The recommended order granted backpay on the basis of the wage rates in effect at the time of the strike as increased by raises granted to a similarly-

[1] In addition, as to one striker who had returned to work prior to the union's offer, the Board left it to the compliance stage to determine whether he had been "fully reinstated," that is, whether petitioner paid him wages and benefits upon his return that were substantially equivalent to those he received before the strike. If petitioner had not done so, the employee was entitled to the difference. *Kuno Steel Products Corp.*, 252 N.L.R.B. at 906 n.5.

situated employee. The order, however, denied backpay in the form of retroactive contributions to the union's pension, annuity, and welfare funds. Pet. App. 12a-23a.

On July 29, 1988, the Board adopted the ALJ's recommended order in part. As recommended by the ALJ, the Board ordered petitioner to make backpay payments to three employees for lost wages.[2] The Board disagreed, however, with the ALJ's denial of backpay for fringe benefits. The Board reasoned that such backpay was necessary to protect the employees' future interests in the benefits funds. Accordingly, the Board ordered petitioner to pay backpay in the form of contributions to the union's pension, annuity, and welfare funds on behalf of five employees. Finally, the Board ordered petitioner to reimburse two employees for the cost of health insurance and medical expenses incurred during the backpay period. Pet. App. 5a-11a. The total amount awarded was $114,925.38, with interest. *Id.* at 2a.

3. The court of appeals, in an unpublished opinion, enforced the Board's order. The court observed that the Act authorizes the Board to restore employees to the financial position they would have occupied but for the employer's unfair labor practice. In carrying out that goal, the court added, the Board has great discretion to design adequate remedies in accordance with the policies of the Act. The court also observed that judicial oversight of such remedies is narrowly limited. Pet. App. 3a.

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[2] Two of the strikers were not awarded backpay for wages. One was found to have retired before he would have been entitled to backpay (or back fringe benefits). Pet. App. 6a n.1, 20a. Another was found to have had interim earnings from other employment that exceeded those that would be available as backpay. *Id.* at 20a.

Applying those principles, the court concluded that the Board had not abused its broad discretion. The court noted that several alternatives were presented to the Board on the method of determining petitioner's backpay liability. Neither the methodology adopted by the Board nor its ultimate determination, the court found, exceeded the Board's remedial powers. Pet. App. 3a.

ARGUMENT

Petitioner makes several fact-bound contentions (Pet. 7-14) that the Board improperly determined the backpay liability petitioner owed as a consequence of its unfair labor practices. The court of appeals' decision upholding the Board's order, however, was correct and does not conflict with any decision of this Court or of any other court of appeals.

Section 10(c) of the Act, 29 U.S.C. 160(c), authorizes the Board to develop adequate remedies for unfair labor practices. It provides that the Board shall order violators "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." This Section confers broad remedial flexibility on the Board. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197 (1941).

In developing backpay awards, the Board seeks to restore employees to the position they would have occupied if the employer had not wrongfully denied reinstatement. *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 188-189 (1973); *NLRB* v. *J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 262-263 (1969). The determination of backpay is a matter entrusted to the Board's sound discre-

tion, and judicial review is limited. *Sure-Tan, Inc.* v. *NLRB,* 467 U.S. 883, 898-899 (1984); *J.H. Rutter-Rex Mfg. Co.,* 396 U.S. at 263; *Phelps Dodge,* 313 U.S. at 198.

Petitioner argues that in four respects, the Board departed from its responsibility to use backpay awards to compensate for actual, rather than speculative losses.

1. Petitioner first contends (Pet. 8-9) that the gross backpay computation improperly awarded wages for hours that the strikers would not have worked if they had been reinstated. Petitioner asserts that the award was excessive because in each instance the particular substitute employee(s) used by petitioner did not work as many hours as the Board awarded in backpay to the discriminatee. The ALJ found and the Board agreed, however, that there was in the aggregate sufficient work during the backpay period to have provided full employment for each discriminatee, and that it was reasonable to assume that petitioner would have assigned the available hours to those experienced employees upon their reinstatement.[3] Pet. App. 16a-19a.

The Board's order reasonably reconstructed events as they would have unfolded if petitioner had not committed unfair labor practices. In this case, the one striker who returned to work was employed full time. Petitioner's remaining interim labor force experienced heavy turnover. Those considerations supported the Board's assumption that if the other senior and experienced employees had been reinstated, they too would have worked full time. Petitioner cites no authority for its apparent view that the Board must disregard reasonable inferences to be drawn

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[3] The fourth quarter of 1982, in which petitioner asserts (Pet. 9) that there was a gross discrepancy between the backpay specification and the number of hours actually worked, was after the end of the backpay period for any unreinstated striker. See Pet. App. 18a-19a.

from the facts in favor of a rigid approach that mechanically matches backpay hours for each discriminatee with the hours actually worked by his replacement(s).

2. Petitioner's second argument (Pet. 10) is that the Board incorrectly increased the discriminatees' wage rates over the backpay period. The Board concluded that, if reinstated, the discriminatees would have received the same increases during the backpay period as did the one "representative employee" who was most similarly situated—the striker who returned to work before the union's offer (see note 1, *supra*). Consequently, the Board took account of those increases in determining the backpay award. Petitioner apparently contends that the backpay award should be based only on the discriminatees' pre-strike rate of pay.

There was no error in the Board's approach. The Board properly estimated what the unreinstated strikers would have been paid by applying wage increases equal to those actually paid to a comparable employee. Reflecting wage increases in a backpay award is a traditional and sensible method to make the employee whole. Indeed, petitioner's approach seems to make the counter-intuitive assumption that the discriminatees would have been denied wage increases that the employer actually gave. The Board is not required to make that illogical assumption.

Contrary to petitioner's suggestion (Pet. 8, 13), the Board's order is fully consistent with the statements in *Sure-Tan, Inc.* v. *NLRB, supra,* that a backpay award must be "tailored to the actual, compensable injuries suffered by the [unreinstated] employees." 467 U.S. at 901. In *Sure-Tan,* the Court concluded that the court of appeals had engaged in undue speculation in awarding a minimum of six months' backpay for undocumented aliens who had

been deported as a consequence of an unfair labor practice. The Court noted that there was no record evidence to support the lower court's surmise that six months was a reasonable period, and the employer had lacked an opportunity to offer mitigating evidence. *Id.* at 900-901 & n.11. Here, however, the record evidence amply supports the Board's backpay determinations, and petitioner fully participated in evidentiary proceedings before the ALJ.

Indeed, the Board's approach here—determining backpay by referring to a "representative employee"—was discussed with approval in *Sure-Tan*. The Court in *Sure-Tan* distinguished the speculative approach before it from other backpay cases in which the Board "had applied to particular facts a reasonable formula for determining the probable length of employment and compensation due." 467 U.S. at 901-902 n.11. As an illustrative case, the Court cited *NLRB* v. *Superior Roofing Co.*, 460 F.2d 1240, 1240-1241 (9th Cir. 1972) (per curiam), and described that case as "upholding [the] use of a 'seniority formula' to compute the earnings of a '*representative employee*' in a reasonable approximation of [a] discharged roofer's earnings." 467 U.S. at 901-902 n.11 (emphasis added). *Sure-Tan* thus confirms the very approach that the Board followed in this case.[4]

3. Petitioner's third contention (Pet. 10-12) is that the Board improperly required retroactive payments to the Union's pension, annuity, and welfare funds. The Board,

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[4] Petitioner also contends (Pet. 8) that the Board's wage increases were inconsistent with footnotes 4 and 5 in *Kuno Steel Products*, 252 N.L.R.B. at 906. Footnote 4, however, does not discuss wage increases. Footnote 5 does not apply to the discriminatees who were denied reinstatement; it applies only to the striker who returned to work before the union's offer. See Pet. App. 16a.

however, fully explained that aspect of its order (Pet. App. 9a n.12):

> In order to be made whole, * * * a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the [employer] to contribute to the welfare fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard* v. *NLRB*, 715 F.2d 441, 446 (9th Cir. 1983), [cert. denied, 466 U.S. 937 (1984)].

The Board's practice of requiring the payment of back fringe benefits has consistently been upheld by the courts of appeals. See, *e.g.*, *Stone Boat Yard* v. *NLRB*, 715 F.2d 441, 446 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *Peterson Painting, Inc.*, 277 N.L.R.B. 103 (1985), enforced, 804 F.2d 1253 (9th Cir. 1986) (Table), cert. denied, 483 U.S. 1006 (1987); *Henson* v. *NLRB*, 428 F.2d 133, 136-138 (8th Cir. 1970). See also *Richard W. Kasse Co.*, 162 N.L.R.B. 1320, 1326 (1967). The objective of assuring that the funds can provide for future needs justifies the Board's approach.[5]

4. Finally, petitioner contends (Pet. 12-13) that the Board improperly awarded contributions for pension

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[5] Petitioner's view (Pet. 11-12) that the Board's earlier decision in *Hassett Maintenance Corp.*, 260 N.L.R.B. 1211 (1982), should have been controlling ignores the Board's explanation here that *Hassett* itself was inconsistent with Board precedent that employees are entitled to restoration of "the full range of [their] interests in the welfare fund." Pet. App. 9a n.12.

benefits "far in excess of those required to insure to the strikers the maximum benefits." While petitioner fails to explain this contention, it may be reiterating its argument that the Board's backpay formula was based on a greater number of hours than the unreinstated strikers would have worked. As shown above, there is no merit to that position.[6]

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[6] Petitioner may also be renewing an argument made in the court of appeals, namely that once a discriminatee has accumulated the maximum pension credits possible, he could receive no further benefits and consequently would suffer no losses from petitioner's nonpayment of back contributions. As the Board's brief in the court of appeals explained, however, if that analysis were correct, the pension section of a prior, expired collective bargaining agreement would have relieved petitioner of the obligation to make contributions for employees who attained eligibility for maximum benefits. The agreement did not do so. Gov't C.A. Br. 24. Consequently, it does not overcompensate the employees to require benefits contributions that would have been made but for the unfair labor practice; it simply protects the employees' future interests. See *Stone Boat Yard* v. *NLRB*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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